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### **Director's Statement Regarding OAL Approval of Workers Compensation Utilization Review Regulations**

The OAL today approves the certificate of compliance for emergency regulations adopted by the Division of Workers Compensation modifying the utilization review system for workers compensation insurance policies. These regulations implement SB 228 (Alarcon), part of the major reform of workers compensation law enacted last year. One provision of these regulations has evoked particular controversy.

The establishment of a utilization review program necessarily requires reviewers to perform the utilization review function. These regulations permit physicians who are licensed in states other than California to serve as reviewers. Many comments were sent to the Division contending that only physicians licensed in California could serve as reviewers. After evaluating this issue closely, OAL concludes that the regulations lawfully implement the law and that the law does not limit the reviewer function only to California-licensed physicians.

Section 4610 of the Labor Code<sup>1</sup> defines "utilization review", in part, as involving treatment recommendations "by physicians, as defined in Section 3209.3." Section 3209.3 provides, in part, that "[p]hysician' includes physicians and surgeons holding an M.D. or D.O. degree . . . licensed by California state law . . ." The definition in Section 3209.3 is subject to the qualification in section 3204 that the definitions apply "[u]nless the context otherwise requires."

The section 3209.3 definition of "physician" is not exhaustive – it does not list every possible provider who could qualify as a physician. Case law interpreting this section has held that a treating physician in workers compensation, although subject to the Section 3209.3 definition of "physician", is not required to be licensed in California<sup>2</sup>. The meaning of "physician" must be evaluated in the context of the whole workers compensation system.

In evaluating these regulations in light of the statutory structure, it is OAL's responsibility to attempt to implement the will of the Legislature, as reflected in the

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<sup>1</sup> Unless stated otherwise, all California Code references are to the Labor Code.

<sup>2</sup> *State Compensation Insurance Fund v. Workers' Compensation Appeals Board* (1977) 69 Cal.App.3d 884, 138 Cal.Rptr. 509. This case interpreted this section as follows: "It appears section 3209.3 was designed merely to codify the rule developed by these cases that compensation is not allowed for treatment by non-physicians. It is doubtful the Legislature ever considered the application of the section to treatment by out-of-state physicians."

legislation. The legislative history of SB 228, from which we might discover the intent of the Legislature, is not extensive. However, the Assembly Floor Analysis is illuminating. It says, in pertinent part, that SB 228 would:

Require all employers to adopt utilization review systems, consistent with the American College of Occupational and Environmental Medicine Occupational Medical Practice Guidelines. In cases involving spinal surgery, denials will go to expedited second opinion process. In all other cases, *the existing qualified medical examiner/appointed medical examiner process will continue to apply.* (emphasis added).

In requiring the use of utilization review, it appears that the Legislature intended to require "utilization review" as the term was commonly understood. Utilization review is commonly used in both in Health Care Service Plans governed by the Knox-Keene Act<sup>3</sup> and health insurance programs regulated by the Department of Insurance<sup>4</sup>. Both Knox-Keene plans and health insurance plans provide utilization review that does not limit reviewers only to California-licensed physicians.

We can find no evidence in the record that the Legislature intended to establish a utilization review program that allowed only California-licensed physicians to serve as reviewers. On the contrary, such evidence as there is indicates that the Legislature intended to employ existing utilization review structure without significant change, including allowing reviewers who are physicians licensed in other states.

Had the Legislature intended to implement a utilization review program that differed substantially from those that previously existed, it could have done so much more explicitly. Absent a clear manifestation of legislative intent to require a utilization review structure for workers compensation insurance significantly different from the commonly understood structure, we must conclude that no such change was intended in SB 228. Case law explicitly holds that Section 3209.3 does not exclude physicians licensed in other states. Therefore, the provision of the regulations allowing out-of-state licensed physicians to serve as reviewers in the utilization process seems the most appropriate way to implement the will of the Legislature on this particular issue.

This statement is intended only to provide an informal and simplified analysis of the most contentious issue involved in these regulations. It is not an exhaustive explanation of all analysis and reasoning that went into the review of the file. Inquiries regarding this issue should be directed to the Director, either by e-mail at [wgausewitz@oal.ca.gov](mailto:wgausewitz@oal.ca.gov), or by telephone at (916) 323-6221.

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<sup>3</sup> CA Health and Safety Code section 11340 *et seq.*

<sup>4</sup> c.f. CA Insurance Code section 10123.135